United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

To Be Argued By:
Anthony R. Palermo, Esq.
Estimated Time of Argument:
20 Minutes

76-7373

In The

United States Court of Appeals

For the Second Circuit

GERALDINE SEVOR,

Plaintiff-Appellee,

vs.

LITTON INDUSTRIES, INC., LITTON BUSINESS SYSTEMS, INC., and McBEE SYSTEMS, A Subsidiary of Litton Industries,

Defendants-Appellants.

ON APPEAL FROM A DECISION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NEW YORK

Civ. No. 75-559

APPELLANTS' BRIEF

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2. Whether sufficient and timely filing of a complaint under Title VII with respect to specific respondents is a jurisdictional prerequisite to Federal Court suit.
3. Whether an employee of an autonomous, independently operated division of a subsidiary corporation can be considered an "employee" of a parent corporation for purposes of suit within the meaning of Title VII.
4. Whether alleged non-willful claims which arise out of acts occurring more than two years prior to commencement of Federal Court suit are time-barred under the Equal Pay Act.
5. Whether the Court below properly failed to make a class action determination under Rule 23(c) Federal Rules of Civil Procedure in denying defendants' motion to dismiss the amended complaint insofar as the same attempts to obtain relief on behalf of a class.
6. Whether the Court below properly denied defendants' request for protective relief in view of the substantial legal and jurisdictional issues presented.

STATEMENT OF CASE

NATURE OF CASE

Plaintiff-Appellee, Geraldine Sevor ("Sevor"), commenced this action on December 30, 1975 by filing her original Summons, along with a Complaint dated December 29, 1975, incorrectly designating the defendants as "Litton Industries and McBee Systems, A Subsidiary of Litton Industries". The Complaint asserts two causes of action. Count I alleges unlawful employment discrimination against women generally, including plaintiff, in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e , et seq, as amended. Count II alleges deprivation of equal employment benefits and wages suffered by plaintiff and other persons similarly situated, in violation of the Equal Pay Act, 29 U.S.C. §206(d).

PROCEEDINGS TO DATE

The original Summons dated December 30, 1975 and Complaint dated December 29, 1975 were served on January 5, 1976 on one David Miller (A-138). At that time, Miller was a Sales Representative in Rochester, New York for McBee Systems, a Division of Kimball Systems, a Division of Litton Business Systems, Inc. ("McBee Systems"). At the same time, plaintiff also caused to be served on Miller a First Notice to Produce dated December 29, 1975.

By motion dated February 10, 1976, the two original defendants moved to dismiss the action on a variety of grounds.

On March 4, 1976, defendants served Responses and Objections to plaintiff's First Notice to Produce.

On or about March 18, 1976, plaintiff unilaterally served on counsel only an Amended Complaint (A-41) purportedly changing the caption of the pleadings to add Litton Business Systems, Inc. as a new named defendant, and further correctly adding the designation "Inc." after Litton Industries. Also on or about March 18, 1976, plaintiff moved to compel discovery (A-43).

On or about April 8, 1976, plaintiff caused to be delivered to the secretary of one Dan Johnson a second Summons (A-205) naming the original defendants and adding Litton Business Systems, Inc. to the caption as a defendant. Copies of the original Complaint dated December 29, 1975, the Amended Complaint dated March 18, 1976, and the First Notice to Produce were also delivered to Mr. Johnson's secretary. Thereafter, on or about April 26, 1976, copies of a third Summons (A-214), undated, were caused to be served on Dan Johnson, the District Manager of McBee Systems in Buffalo, New York, along with copies of the Complaint dated December 29, 1975, the Amended Complaint dated March 18, 1976, and the First Notice to Produce. The last Summons substituted the name "Litton Automated Business Systems, Inc." in place of "Litton Business Systems, Inc."[1]

[1]On May 21, 1976, counsel for the parties stipulated to amend the caption on the last Summons to reinstate the name of "Litton Business Systems, Inc." in place of "Litton Automated Business Systems, Inc."

On April 30, 1976, all defendants moved (A-215) to dismiss the first and second causes of action of the Amended Complaint because of failure to state a claim (A-218); to dismiss the first cause of action for lack of jurisdiction with respect to all allegations under Title VII, other than possibly failure to hire, because plaintiff failed to file with the Equal Employment Opportunity Commission ("EEOC") within the statutory time required (A-218); to dismiss the second cause of action under the Equal Pay Act because it was time-barred (A-218); to dismiss the first and second causes of action insofar as they purport to seek class relief (A-219); to set aside purported service of process upon Litton Industries, Inc., and to dismiss for lack of jurisdiction over Litton Industries, Inc. (A-219). In addition, defendants moved for protective relief with respect to plaintiff's First Notice to Produce, pending determination of the motions addressed to the jurisdiction and sufficiency of the pleadings or, in the alternative, to limit discovery of records sought to those of plaintiff's actual employer (A-219).

On or about May 21, 1976, plaintiff cross-moved to compel discovery (A-239).

DISPOSITION BELOW

The Honorable Harold P. Burke, Judge of the United States District Court for the Western District of New York, by Decision and Order dated June 29, 1976 (A-246),

treating defendants' motions as seeking relief for summary judgment under Rule 56, Federal Rules of Civil Procedure ("FRCP"), denied defendants' motions in their entirety and granted plaintiff's motion to compel production of records. Defendants appeal from this decision and order (A-251).[2]

STATEMENT OF FACTS

CORPORATE BACKGROUND OF DEFENDANTS

Litton Industries, Inc. is a Delaware corporation with principal place of business in Beverly Hills, California (A-31). All of Litton Industries' books and records are maintained at its office in California (A-31), and it is not now and never has been qualified to do business in New York and has no general or special agent for service of process in New York (A-31).

Litton Business Systems, Inc. is a New York corporation with principal offices located at New York, New York, and is a wholly owned subsidiary of Litton Industries (A-140).

[2]Subsequent to the filing of the Notice of Appeal, appellants obtained from Judge Burke an Order to Show Cause, returnable September 13, 1976, with a temporary stay of his order directing compliance with plaintiff's Notice to Produce prior to July 30, 1976, why a stay pending appellate decision should not be granted. At the request of plaintiff, hearing on the application was adjourned to September 27, 1976. Since that adjournment, Judge Burke has been hospitalized for surgery, and the motion addressed to his Order and Decision of June 29, 1976 is now scheduled to be heard on October 4, 1976 by the Hon. John T. Curtin, Chief Judge, Western District of New York. In addition, appellants have moved the Court to modify its Decision to certify significant questions of law involved in this matter under §1292(b) of Title 28 U.S.C. and/or under Rule 54(b) FRCP.

McBee Systems currently is a Division of Kimball Systems, which is a Division of Litton Business Systems, Inc. (A-140, 209). In February, 1965, Litton Industries, Inc. acquired Royal McBee Corporation and thereupon separated that corporation into two distinct divisions, the Royal Typewriter Company and the McBee Company (A-141). In early 1969, the McBee Company became Litton Automated Business Systems, a Division of Litton Business Systems, Inc. (A-142).

McBee Systems operates as an autonomous unincorporated division of Litton Business Systems, Inc., and maintains its principal place of business at Carlstadt, New Jersey, and has various offices and facilities throughout the United States (A-209). McBee Systems has its own General Manager and staff and formulates its own personnel and labor policy and is solely responsible for the recruitment and hiring of its employees and establishment and administration of wage scales and policies (A-210). McBee Systems has separate Affirmative Action Programs for its major plant locations (A-210).

McBee Systems is not operated or controlled by Litton Industries, Inc. or Litton Business Systems, Inc. (A-210).

The operations of Royal Typewriter Company ("Royal") have been maintained at various relevant times as an autonomous unincorporated division of Royal McBee Corporation and as a separate corporation, Royal Typewriter Company (A-207). Royal formulates its own personnel and labor policy and is solely responsible for establishment and administration of the same

(A-207). Royal was not, during the period of plaintiff's employment, operated or controlled by Litton Industries, Inc. or Litton Business Systems, Inc. (A-207).

PLAINTIFF'S ORIGINAL EMPLOYMENT (1964-1973)

Sevor's relevant employment history is summarized in the affidavit of Dan Johnson (A-141). In brief, plaintiff was employed as follows:

1. By Royal Typewriter Company, a Division of Royal McBee Corporation, from November 6, 1964 to February 19, 1965, and thereafter by Royal Typewriter Company, Inc. (A-208), a distinct Delaware corporation, until June 27, 1967 when plaintiff resigned. At that time, she submitted her letter of resignation to Royal Typewriter Company (A-153).

2. By McBee Systems, then a part of Royal Typewriter Company, Inc., from February 12, 1968 to September 27, 1968 (A-154-155), when a leave of absence for personal reasons was granted.

3. By Automated Business Systems, a Division of Litton Business Systems, Inc., from March 10, 1969 (A-156) to August 31, 1973 (A-163), the last day plaintiff was employed. Pursuant to her notice on July 16, 1973, plaintiff resigned her position as installation supervisor effective August 31, 1973 to resume college full time (A-167). This resignation was directed to Jim Livingston, who was plaintiff's supervisor at Litton Automated Business Systems (A-188).

Plaintiff was never engaged or paid by Litton Industries, Inc. From the time functions of Royal Typewriter Company were transferred to Litton Business Systems, Inc., plaintiff was engaged and paid by Automated Business Systems, a Division of Litton Business Systems, Inc., or by Litton Business Systems, Inc. See sample checks dated July 27, 1973 and August 28, 1973 (A-164-165) and W-2 wage statements for Litton Automated Systems for 1968, 1969, 1972 and 1973 (A-212-213). Litton Automated Business Systems at times was also known as "Litton ABS", but it always remained a Division of Litton Business Systems, Inc.

Prior to September 27, 1968, and dating back to November 6, 1964, plaintiff was an employee of Royal Typewriter (A-207). At no time was she ever employed or paid by Litton Industries, Inc. See W-2 forms showing plaintiff's employer to be Royal Typewriter Company, Inc. for the years 1965 and 1966 and Litton Business Systems, Inc. as successor by merger with Royal Typewriter Company, Inc. for the year 1967 (A-208).

PLAINTIFF'S RECRUITMENT BY McBEE SYSTEMS (1974-1975)

In or about October and November 1974, some thirteen (13) months after plaintiff resigned and terminated her employment as a computer installation supervisor with Litton Automated Business Systems, she was solicited and interviewed by Dan Johnson for employment by McBee Systems as a salesperson (A-142). Originally, Johnson, the District Manager for McBee Systems, was allocated four (4) sales positions, two (2) each for Buffalo and Rochester. In late December 1974 or early January

1975, Johnson was notified that due to economic cutbacks, the job allocations were reduced to one (1) sales position for each of the two cities. Johnson chose to hire someone other than plaintiff and so notified her in January 1975 (A-142).

ARGUMENT

Litton Industries, Inc. has not been properly served with process and the Court lacks jurisdiction over said defendant. Even assuming, for argument, proper service upon Litton Industries, Inc. could be obtained, it is not a proper defendant since it was never the actual employer of plaintiff within the meaning of either Title VII of the Civil Rights Act of 1964 or the Equal Pay Act.

Even assuming further, for argument, that Litton Industries, Inc. was properly served and is deemed somehow to have been plaintiff's employer within the meaning of applicable law, plaintiff has not made the required timely filing with the EEOC and has thus failed to meet the jurisdictional prerequisites to Federal Court action for any of the claims asserted in Count I of her Complaint relating to acts alleged to have occurred during her original employment which terminated by her resignation effective August 31, 1973.

With respect to Count II of the Complaint, the allegations again relate back to plaintiff's original employment and the asserted cause of action is time-barred because it was com-

menced more than two (2) years after the acts complained of, i.e. twenty-eight (28) months after plaintiff's voluntary termination of employment on August 31, 1973. In addition, Litton Industries, Inc. was not plaintiff's employer and is not a proper defendant in Count II, even if it were properly served.

In view of the foregoing, the Order and Decision of the Court below was in error and the Motion to Dismiss the Complaint and/or to grant partial summary judgment as to some of the defendants and/or some of the plaintiff's allegations should have been granted as a matter of law.

In the interest of justice and orderly practice, a protective order is required to prevent incredible burden and expense and should be granted in view of the substantial jurisdictional issues presented.

It is respectfully submitted that the Order and Decision of the Court below involves questions of law as to which there is substantial ground for difference of opinion, and that an immediate appeal may materially advance the ultimate termination of the litigation.[3]

It is respectfully submitted the Court has the power to accept jurisdiction over this appeal under 28 U.S.C. §1292(b)[4]

[3]At footnote 5 of the decision in Egelston v. State University College at Geneseo, et al (2nd Cir., docket number 76-7047, decided June 7, 1976), this Court stated, in relevant part, "nor need we--or do we--resolve the still-open question of whether these time requirements for filing with the agency are 'jurisdictional prerequisites' to suit in the Federal Courts."

[4]Appellants have moved the Court below to supplement its Decision of June 29, 1976 to certify questions of law as required by 28 U.S.C. §1292(b) and/or by Rule 54(b) FRCP.

and its inherent power to supervise the administration of justice. See §1651 of Title 28 U.S.C.

POINT I

THE COURT LACKS JURISDICTION OVER LITTON INDUSTRIES, INC.

The validity of service of process on Litton Industries, Inc. depends upon the effectiveness of service of the original Summons upon David Miller on January 5, 1976 or of the Summons upon the secretary of Dan Johnson on April 8, 1976 or the Summons upon Dan Johnson on or about April 26, 1976. It is respectfully submitted none of the above constitutes valid service upon Litton Industries, Inc. and the Summons should be quashed and purported service vacated as to said party.

A. Plaintiff Has Failed To Effect Valid Service Of Process Upon Litton Industries, Inc.

Rule 4(d)(3) and (7) FRCP describe the applicable requirements for valid service of process upon a foreign corporation. Subparagraph (3) states in relevant part:

> "...by delivering a copy of the summons and of the complaint to an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process..."

Subparagraph (7) adopts state law. Section 311 of the New York Civil Practice Law and Rules ("CPLR") prescribes essentially the same personal service as is set forth in Rule 4(d)(3) FRCP above.

None of the three persons served were officers, managing or general agents, or agents authorized by appointment or by law to receive service of process on behalf of Litton Industries, Inc.

At the time of service on David Miller, he was only an employee of McBee Systems (A-137). Miller was not an officer or managing or general agent of McBee Systems or Litton Business Systems, Inc. or Litton Industries, Inc. (A-138). Moreover, Miller was not authorized by appointment or by law to accept service of process on behalf of said organizations (A-138, 144). The same is true of Dan Johnson (A-31). However, since Johnson was District Manager of McBee Systems in Buffalo, New York, it is conceded for purposes of this appeal that he was a proper person for service upon McBee Systems and Litton Business Systems, Inc.

B. Service Of Process On A Manager Of A Wholly Owned, Independently Operated Subsidiary Does Not Constitute Valid Service Upon The Parent Corporation

Assuming that Johnson was a proper agent for service of process upon Litton Business Systems, Inc., the controlling law in this Circuit appears to be that service upon a subsidiary in New York is not valid service on the parent where the two corporations operate as separate entities. See §1104, Wright and Miller, Federal Practice and Procedure; and Cannon Manufacturing Co. v. Cudahy Packing Co., 267 U.S. 333 (1925); and Cook v. Bostitch, 328 F.2d 1 (2nd Cir. 1964). In Bostitch, supra, this Court stated:

> "The appellants contend that corporate separation between the parent and subsidiary is merely formal, not real. The district court held that Bostitch Eastern, although a wholly owned subsidiary of Bostitch, acts 'apart from and independently of its parent' and 'therefore, service upon the subsidiary in New York is not valid service on the parent'. This is a correct statement of the applicable law; it is well supported by authority. Under our recent decision in Arrowsmith v. United Press International, 2d Cir., 320 F.2d 219, State law governs the question of whether a foreign corporation is amenable to suit in a Federal court sitting in that State where the jurisdiction is based upon diversity of citizenship. New York law is clear that '(a) corporation may not be subjected to the jurisdiction of our courts merely on the basis of the activities of its subsidiaries.' Simonson v. International Bank, 16 App.Div.2d 55, 225 N.Y.S.2d 392, 395-396. See also Compania Mexicana Refinadora Island, S.A. v. Compania Metropolitana De Oleoductor, S.A., 223 App.Div. 346, 228 N.Y.S. 36, affirmed 250 N.Y. 203, 164 N.E. 907. This is simply the general rule enunciated in Cannon Manufacturing Co. v. Cudahy Packing Co., 267 U.S. 333, 45 S.Ct. 250, 69 L.Ed. 634. Although, of course, many policies of the subsidiary are set by the parent, there was substantial evidence to justify the District Court's finding that the two corporations are separate entities."

In the instant case, there is no substance to the contention that the corporate separation of Litton Business Systems, Inc. (and its autonomous operating Divisions, Litton Automated Business Systems or McBee Systems), and Litton Industries, Inc. was merely formal and not real or that the two corporations were not separate corporate entities. The mere abundance of subsidiary corporations and operating divisions or the consolidation of financial statements for shareholder reporting purposes of the parent corporation does not destroy

the independent legal existence of distinct corporations. Plaintiff argues that Litton Industries, Inc.'s annual report demonstrates that there is only one corporate entity. It is submitted this proposition is totally without legal or rational merit.

See the affidavits of present representatives of McBee Systems and Royal to the effect that these subsidiaries operate autonomously and independently (A-206, 209). In addition, see the affidavit of James Livingston, submitted by plaintiff, which states at paragraph 6 that Litton Automated Business Systems was operated as a separate corporation (A-189).

POINT II

LITTON INDUSTRIES, INC. IS NOT A PROPER DEFENDANT SINCE SEVOR WAS NEVER ITS "EMPLOYEE" WITHIN THE MEANING OF TITLE VII.

Section 2000e-2 of 42 U.S.C. declares that "It shall be an unlawful employment practice for an employer--

> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin;"

Statutory definitions of the terms "employee" and "employer" are as follows:

"The term 'employee' means an individual employed by an employer." 42 U.S.C. §2000e-(f).

"The term 'employer' means a person engaged in an industry affecting commerce..." 42 U.S.C. §2000e-(b).

Webster's New Collegiate Dictionary, Seventh Edition, defines the ordinary meaning of the key words in relevant context as follows:

The word "employee" is "one employed by another usually for wages or salary and in a position below the executive level".

The word "employer" is "one that employs".

The word "employ" is defined as follows: "(1): to use or engage the services of (2): to provide with a job that pays wages or a salary".

The facts relating to plaintiff's employment are not in dispute, notwithstanding plaintiff's attempt to loosely apply the term "employer" to parent as well as subsidiary corporations. Plaintiff's relevant employment history is described above under Statement of Facts. At various times from 1964 to 1973, she was employed and paid by Royal Typewriter, McBee Systems, and Automated Business Systems, a Division of Litton Business Systems, Inc. Evidence of employment was submitted to the Court below in the form of W-2 wage statements from the respective employers during the original employment period.

Plaintiff was never employed or paid by Litton Industries, Inc. and, conclusory claims to the contrary notwithstanding, there is no support to plaintiff's contention that Litton Industries, Inc. was her actual employer.

Plaintiff urges that since she had an opportunity to participate in a stock purchase plan in which Litton Industries, Inc. stock was acquired, she was a Litton Industries, Inc. employee. The argument is without merit. Obviously, shares of stock in wholly owned subsidiaries of Litton Industries, Inc. are not available for purchase on the open market since the parent company owns all the shares. But, can it reasonably be argued that the right to purchase Litton Industries, Inc. shares makes one an "employee" of that company?

It should be noted that Litton Industries, Inc. is a multi-national industrial conglomerate with numerous independent, autonomous subsidiary operating entities. See Annual Report (A-57-118). Litton Industries, Inc. is the parent of the subsidiaries, but that does not make it the actual employer of some ninety-seven thousand subsidiary employees.

Conclusive proof of who Sevor's actual employer was at the time she resigned in June of 1967 and later as of August 31, 1973 is found in her own acts. Who did she submit her resignation to? In 1967, it was to Royal Typewriter Company (A-153). The second time, it was delivered to James Livingston, her supervisor at Litton Automated Business Systems (A-188). Mr. Livingston describes himself in an affidavit submitted to the Court below by plaintiff as follows:

"I was the general supervisor for Geraldine Sevor when I worked as Area Systems Manager for Litton Automated Business Systems."

In view of the foregoing, it is respectfully submitted Litton Industries, Inc. was not an "employer" of Sevor within the meaning of the Civil Rights Act of 1964 or the Equal Pay Act, and the Complaint as to Litton Industries, Inc. should be dismissed as a matter of law.

POINT III

SEVOR'S CLAIMS RELATING TO ACTS OCCURRING DURING HER EMPLOYMENT PERIOD UP TO AUGUST 31, 1973 DO NOT SATISFY JURISDICTIONAL REQUIREMENTS UNDER TITLE VII.

Sevor voluntarily terminated her employment with Litton Automated Business Systems effective August 31, 1973 to resume full time studies at Monroe Community College (A-167). Over two (2) years later, in November or December 1974, she was recruited by McBee Systems, and in January 1975 she was told she would not be hired (A-142).

On or about February 24, 1975, plaintiff filed a Complaint solely against McBee Systems with the New York State Division of Human Rights ("State Division") (A-50, 168). Thereafter, on or about March 28, 1975, plaintiff amended her State Complaint and on the same date caused a copy of the amendment to be filed with the Regional Director of the State Division (A-170-172). At some point after March 28, 1975, copies of the Complaint and the amendment were forwarded to the Equal Employment Opportunity Commission ("EEOC")(A-173). On April 29, 1975, McBee Systems in Rochester as respondent re-

ceived a Notice of Charge of Employment Discrimination, dated April 28, 1975, from the Buffalo office of EEOC, with reference to charge TBU5-0361 (A-143). No other complaint has been received by defendants relative to plaintiff. The date of alleged violation on the State complaint is shown as February 24, 1975 and the nature of the charge is designated "hiring" and "training/apprenticeship" (A-173). On or about October 6, 1975, McBee Systems received a "Notice of Right to Sue Within 90 Days" with reference to case TBU5-0364. No other "Right to Sue" notice has been received by McBee Systems relative to plaintiff, and no complaint was filed with the EEOC within the period of either 180 days or 300 days of the plaintiff's last employment which terminated with Litton Automated Business Systems on August 31, 1973 (A-143).

In accordance with the statutory scheme, it is respectfully urged that timely filing of a charge before the EEOC is a jurisdictional prerequisite to institution of Federal Court action predicated upon a violation of Title VII. See 42 U.S.C. 2000e-5(e); McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973); Moore v. Sunbeam Corp., 459 F.2d 811 (7th Cir. 1972); Stebbins v. Nationwide Mutual Insurance Co., 382 F.2d 267 (4th Cir. 1967), cert. denied, 390 U.S. 910 (1960); Richardson v. Miller, 446 F.2d 1247 (3rd Cir. 1971). See also DeMatteis v. Eastman Kodak Co., 511 F.2d 306 (2nd Cir. 1975). See also footnote 5, Egelston v. State University College at Geneseo, et al, supra.

Charges under §2000e-5 must be filed with the EEOC within 180 days, or within 300 days if a State charge has been filed, after the alleged unlawful practice occurred. In the instant case, no charges were filed by plaintiff with the Commission until at least March 28, 1975, and these relate only to an alleged violation in January 1975. This filing is well beyond either the 180 day or the 300 day limitation following the voluntary resignation of plaintiff from Litton Automated Business Systems on August 31, 1973. Accordingly, there is a failure of jurisdiction for acts which occurred prior to said date.

It is further submitted that it is a jurisdictional prerequisite to the filing of a civil action that a complaint be filed with the EEOC against the party to be charged with respect to the particular allegations detailed against such respondent specified in the EEOC charge. See LeBeau v. Libby-Owens-Ford, 484 F.2d 798 (7th Cir. 1973); Mickel v. South Carolina State Employment Service, 377 F.2d 239 (4th Cir. 1967); Bowe v. Colgate Palmolive Co., 416 F.2d 711, 719 (7th Cir. 1969). The State Division Complaint erroneously named McBee Systems "a Subsidiary of Litton Industries". Litton Industries, Inc. is not named as a party respondent in that Complaint, nor is Litton Business Systems, Inc. Thus, since the State Division Complaint does not name either Litton Industries, Inc. or Litton Business Systems, Inc. as respondents, the Federal Court Complaint is jurisdictionally defective as to said parties.

The State Division Complaint against McBee Systems essentially relates to an alleged discriminatory practice which occurred on January 16, 1975 when plaintiff was told by the District Manager of McBee Systems that she was "scratched" from a McBee Systems training school which was to have commenced in January, 1975. Aside from a brief reference in paragraph 7 of that State Complaint to a job offer in March 1973 which plaintiff refused, there is no claim anywhere in the State Division original or Amended Complaint that plaintiff was discriminated against in any way during the period of her original employment. Thus, plaintiff has not only not made the timely filing with EEOC required under Title VII, but has never even claimed a job or pay grievance with respect to her original employment until she filed the instant action in Federal Court on December 31, 1975. This is some twenty-nine (29) months after plaintiff voluntarily quit her employment. The scope of the State Division Complaint is insufficient to support the instant Federal Court action.

The single act complained of by plaintiff is the decision of McBee Systems on January 16, 1975 not to hire and train her. This act does not constitute a "continuing violation" which can relate back to plaintiff's original employment during the period up to August 31, 1973. While the rule of "continuing violation" has been invoked in some cases to allow claims which might otherwise be time-barred because of time restrictions, the rule does not apply to plaintiff.

A single act such as the denial of promotion or a decision not to hire or a layoff, without more, is not a "continuous" violation. See Moore v. Sunbeam Corp., supra, 459 F.2d at 828. See also Cox v. U.S. Gypsum Co., 409 F.2d 289 (7th Cir. 1969); Dupree v. Hutchins Bros., 521 F.2d 236 (5th Cir. 1975); Mason v. Owens-Illinois, Inc., 11 FEP 441 (S.D. Ohio 1973), rev'd on other grounds, 517 F.2d 520 (6th Cir. 1975).

In view of the foregoing, it is respectfully submitted plaintiff has not met the jurisdictional requirements prescribed by statute and any claims relating to alleged discrimination during her original period of employment are time-barred. As a matter of law, the complaint should be dismissed as to all defendants except McBee Systems, with reference to all claims other than those specified in the State Division Complaint against McBee Systems which occurred in January 1975. Such dismissal would be both legally correct and fair and equitable on the facts here presented.

POINT IV

COUNT II FAILS TO STATE A CAUSE OF ACTION UNDER THE EQUAL PAY ACT.

Count II is deficient as a matter of law since no facts are alleged in support of the claimed violation of the Equal Pay Act. The allegations are so vague and ambiguous that they fail to meet minimum requirements of notice

pleading. Accordingly, Count II should be dismissed as to all parties.

POINT V

COUNT II ALLEGING CLAIMS UNDER THE EQUAL PAY ACT RELATING TO SEVOR'S ORIGINAL EMPLOYMENT ARE TIME-BARRED.

Sevor's employment with Litton Automated Business Systems terminated by her resignation effective August 31, 1973. This action was not commenced until filing of the Summons on December 30, 1975, which is more than two (2) years from the date of employment termination. An action to enforce a claim under the Equal Pay Act must be commenced within two (2) years after the cause of action accrued. See 29 U.S.C. §255(a), which states, among other things, as follows: "...and every such action shall be forever barred unless commenced within two years after the cause of action accrued".

For purposes of the Equal Pay Act, an action is commenced when the Federal Court Summons and Complaint are filed. The time of filing of a Complaint with the EEOC does not commence the Federal Court action, nor does it toll the running of the Statute of Limitations. Moreover, in the instant case, the filing of the State Division Complaint with the EEOC does not give any notice of any alleged violation of the Equal Pay Act (A-168-172). While there is a three-year exception to the normal period of limitations, this is applicable only where a

willful violation is involved. No facts to support a willful violation can be or are alleged.

Accordingly, Count II is barred as to all acts occurring during Sevor's original employment. The Equal Pay Act is inapplicable to the decision by McBee Systems not to hire Sevor in January 1975.

In addition, the reasons previously stated in support of the position that Litton Industries, Inc. was not plaintiff's employer for purposes of Title VII are similarly valid to establish that Litton Industries, Inc. was not plaintiff's employer for purposes of the Equal Pay Act.

POINT VI

CLASS ACTION ALLEGATIONS IN THE COMPLAINT ARE IMPROPER AND SHOULD HAVE BEEN STRICKEN AND THE COMPLAINT DISMISSED AS A CLASS ACTION.

Both Count I and Count II are defective insofar as they seek relief on behalf of a class. Count I fails to allege the necessary requirements under Rule 23 of the FRCP. There is nothing to show that (1) the class is so numerous that joinder of all members is impracticable. (2) that there are common questions of law or fact; (3) that the claims of the alleged representative party are typical, and (4) that the representative party will fairly and adequately protect the interests of the class. Further, there is no demonstrated satisfaction of the requirements of Rule 23(b) of the FRCP.

The Court below made no determination on whether the instant action could be maintained as a class action.

With respect to Count II, plaintiff failed to obtain written consent of class members as required under the Equal Pay Act. Title 29 U.S.C. §216(b) expressly provides as follows: "No employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the Court in which such action is brought".

POINT VII

PROTECTIVE RELIEF IS NECESSARY TO PRESERVE ORDERLY PROCEDURE AND TO FOSTER THE INTEREST OF JUSTICE AND PREVENT UNCONSCIONABLE EXPENSE AND WASTE.

Plaintiff's First Notice to Produce applies to all parties. It calls for production of countless records of employees who were with Litton Automated Business Systems from 1965 to date, as well as all records of employees who are now with McBee Systems, Eastern Region, from 1965 to date (A-17). The notice also requires Litton Industries, Inc. and Litton Business Systems, Inc. to produce for copying "All affirmative action programs" from 1965 to date, "All EEO-1 reports" etc., and "All compliance reviews, audits" etc. (A-18).

Litton Industries, Inc. is a large, multi-national conglomerate with many subsidiaries and divisions (A-57-118). Sevor was not employed by Litton Industries, Inc., but rather

by Royal Typewriter Co., Inc., and then later Litton Automated Business Systems, a Division of Litton Business Systems, Inc., and most recently by McBee Systems (A-141).

It is respectfully submitted that justice requires a final determination of the jurisdictional issues raised herein before the broad discovery sought is granted. Unless and until significant legal questions are finally resolved, it will be impossible to determine relevancy as to time, subject matter, and parties. The result will be an enormous burden which involves waste of time, effort and expense, not to speak of the annoyance and inconvenience.

The employment policies of Royal, McBee Systems, and Litton Automated Business Systems are independently established and executed (A-206-211). Each employer maintained its own personnel records, books, and payroll records, and had its own operating officers and staff formulate its own personnel and labor policy, and was solely responsible for the recruitment and hiring of its employees, and establishment and administration of wage scales and policies and benefit programs. The Royal Division and the McBee Division operated and controlled their own employment policies independently, and the same were not operated or controlled by Litton Business Systems, Inc. or Litton Industries, Inc. McBee Systems maintains separate Affirmative Action Programs for each major plant location, and the recruitment, selection and hiring of sales personnel for McBee Systems is the responsibility of each district manager

of McBee Systems (A-210).

Under the circumstances, it is respectfully urged that to subject Litton Industries, Inc. and all of its unrelated divisions and subsidiaries to the type of unbridled disclosure sought by the plaintiff herein is without precedent and is wholly impractical and grossly prejudicial without serving any useful legitimate purpose of plaintiff.

In the exercise of its inherent supervisory powers, this Court should reverse or modify the Order of the Court below granting discovery. See §1651 of Title 28, U.S.C.

CONCLUSION

In view of the foregoing, the Order and Decision of the Court below should be reversed and the following relief granted:

1. Count I alleging violations of Title VII should be dismissed as to all appellants, with leave to replead the Complaint as to McBee Systems only with respect to any claimed sex discrimination arising out of the failure of McBee Systems to hire and train Sevor in January 1975.

2. Count II alleging Equal Pay Act violations should be dismissed as to all appellants insofar as it relates to acts prior to August 31, 1973.

3. A determination should be made that a class action may not be maintained in the circumstances and class action allegations should be stricken from the pleadings.

4. A protective Order should be entered or directed,

limiting discovery and production of records to specific entities or autonomous divisions of which Sevor was an actual employee and pertaining to time periods relevant to any permitted pleadings.

Dated: September 27, 1976

Respectfully submitted,

BRENNAN, CENTNER, PALERMO & BLAUVELT

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Affidavit of Service

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(716) 232-6920

Johnson D Hay/Publisher
Russell D Hay/Board Chairman

The Daily Record

September 29, 1976

Re: Sevor v Litton Industries, Inc. et al

State of New York)
County of Monroe) ss.:
City of Rochester)

Johnson D. Hay

Being duly sworn, deposes and says: That he is associated with The Daily Record Corporation of Rochester, New York, and is over twenty-one years of age.

That at the request of

Brennan, Centner, Palermo and Blauvelt

Attorney(s) for

Defendants-Appellants

On September 29, 1976 two (2)
(s)he personally served ~~XXXXXX~~ copies of the printed ☐ Record ☒ Brief ☒ Appendix
of the above entitled case addressed to:

MS. EMMELYN S. LOGAN-BALDWIN, ESQ.
510 POWERS BUILDING
ROCHESTER, NY 14614

☐ By depositing true copies of the same securely wrapped in a postpaid wrapper in a Post Office maintained by the United States Government in the City of Rochester, New York.

☒ by hand delivery

John D. Hay

Sworn to before me this 29th day of September 1976

Lester A. Fanning

Notary Public
~~Commissioner of Deeds~~

LESTER A. FANNING
Notary Public in the State of New York
MONROE COUNTY, N. Y.
Commission Expires March 30, 1978